A

PP

v.

BASRI TALIB

B

HIGH COURT MALAYA, MELAKA
ABU SAMAH NORDIN J
[CRIMINAL APPEAL NO: 41-16-2003]
2 FEBRUARY 2006

C ***CRIMINAL PROCEDURE:*** *Sentence - Appeal against sentence - Appellant sentenced under s. 31(1)(a) Child Act 2001 to two years' imprisonment for physically abusing his natural daughter - Plea of guilt - First offender - Purpose and ideals of Act - Welfare of child - Whether magistrate considered relevant factors in sentencing appellant - Whether* D *sentence ought to be reduced*

The appellant was charged in the Magistrate's Court under s. 31(1)(a) of the Child Act 2001 ('Act') for physically abusing his natural daughter, who was then about nine and a half years old. He pleaded guilty and was sentenced to two years' imprisonment E and ordered to execute a bond with one surety to be of good behaviour for a period of three years immediately after serving his sentence of imprisonment. He was then unrepresented. The appellant appealed against the sentence on the ground that it was excessive, urging the court to substitute the sentence of F imprisonment with a fine only as he had pleaded guilty and was a first offender. The pertinent issue in this appeal was whether the learned magistrate had considered the relevant factors in sentencing the appellant.

G **Held (allowing the appeal in part):**

(1) The learned magistrate had made an obvious omission when she failed to take into account that the appellant had pleaded guilty and was a first offender. It is also desirable for the court H to enquire from the offender himself in instances in which he is unrepresented before passing sentence. Furthermore, the appellant had regretted his action and while on bail pending appeal, had not done any harm to the daughter, who remained, and still is, under his care and custody. A long I custodial sentence under the circumstances would deprive her of parental care and financial support, and it might also have

an adverse emotional and psychological effect on her. The appellant also had two other children to support and a long custodial sentence would deprive them similarly. (paras 15, 16, 17 & 18)

(2) Any offence of violence against children under the Act is grave and serious and any offender, if found guilty, will be met with a stiff sentence where the circumstances of the case warrant it. The Act, however, is not solely meant to punish the offender and was specially enacted to consolidate the laws relating to the "care, protection and rehabilitation of children". One of the ideals of the Act as expressed in the preamble is assisting the family to "assume their responsibilities as the source of care, support, rehabilitation and development of children in society". A long prison sentence in this case may well destroy the family bond between the father and the daughter. The family may eventually disintegrate, an eventuality which the Act seeks to prevent. (paras 19 & 20)

[Sentence reduced to imprisonment of one year; order of magistrate under s. 31(2) of the Act affirmed.]

Case(s) referred to:
Leong Kok Huat v. PP [1998] 4 CLJ 106 HC
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC
Mohamed Senik v. PP [2005] 1 LNS 74
Ng Tuck Shen v. PP [1982] 1 MLJ 27
PP v. Loo Choon Fatt [1976] 2 MLJ 256
PP v. Mohamed Nor & Ors [1985] 2 MLJ 201
PP v. Ravindran & Ors [1993] 1 MLJ 45.
R v. Costen [1980] 11 Cri App (S) CA 182
R v. Teo Cheng Lian [1969] MLJ 170
Sau Soo Kin v. PP [1975] 2 MLJ 134
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC

Legislation referred to:
Child Act 2001, s. 31(1)(a), (2)
Criminal Procedure Code, s. 294

Other source(s) referred to:
DA Thomas on Principles of Sentencing, 2nd edn, pp 109-110
Halsbury's Laws of England, vol 9, para 365

For the appellant - Nor Hisham; M/s Hisham, Leong & Assoc
For the respondent - Faradziah Kasah DPP

Reported by Suresh Nathan

JUDGMENT

Abu Samah Nordin J:

[1] The appellant, aged 42 years, was charged in the Magistrate's Court Melaka under s. 31(1)(a) of the Child Act 2001, for physically abusing his natural daughter who was then about 9 1/2 years old.

[2] He pleaded guilty and was sentenced to two years imprisonment and ordered to execute a bond with one surety to be of good behaviour for a period of three years immediately after serving his sentence of imprisonment. He was then unrepresented.

[3] He is now appealing against the sentence on the ground that it is excessive. The learned counsel for the appellant urged the court to substitute the sentence of imprisonment with fine only as he had pleaded guilty and was a first offender. The phrase 'shall be liable' in s. 31(1) of the Act means that the sentence of imprisonment is only discretionary and not mandatory: See *Leong Kok Huat v. PP* [1998] 4 CLJ 106. He had by pleading guilty saved the court's time and expense: See *Sau Soo Kin v. PP* [1975] 2 MLJ 134.

[4] The victim was, since birth and still is, under the appellant's care and custody as her parents were divorced in 1995. The mother had remarried and had never visited her. The appellant remarried in 1996 and the victim had, since then been staying with the appellant and the stepmother. The appellant is also looking after two other children. The elder one, aged 19 years, is studying in Universiti Teknologi Mara and the younger brother, aged 17 years, is in form five. A custodial sentence wound deprive the victim and her brothers of their parent's love and financial support.

[5] The learned deputy public prosecutor ('DPP') submitted that the appelllant had committed a very serious offence and the medical evidence and the photographs showed that the victim had suffered physical injuries all over her body. Old scars could be seen

from the photographs. The appellant had inflicted those injuries both with his belt and bare hands. The appellate court ought not to disturb the sentence by the learned magistrate in excercise of her discretion unless she proceeded on wrong principles: See *Mohamed Senik v. PP* [2005] 1 LNS 74 or there was a failure to apply the right principles: See *Zaidon Shariff v. PP* [1996] 4 CLJ 441.

[6] As the Child Act came into force only recently, namely on 1 August 2002, I enquired from the learned DPP whether there has been any reported case in respect of a similar offence, to which learned DPP replied that, to the best of her knowledge, there was none. She could only rely on a number of English cases referred to by D.A. Thomas on *Principles of Sentencing*, 2nd edn. at pp. 109-110, namely Doharty, Harris, Hindle and Bull. In all those cases, the victims were between six months old and three years old. In Doherty, the appellate court reduced the sentence from four years to two years imprisonment, in Bull from three years to two years imprisonment. The appellate court upheld the sentence of three years imprisonment in Hindle and two years imprisonment in Harris. The learned author made the following observation at p. 108:

> Speaking generally of cases of violence to children, the Court observed that few cases presented greater difficulties in sentencing; 'at one extreme they reveal utter brutality which must be dealt with very severely ... at the other extreme one gets cases of undoubted maltreatment ... where the explanation is to be found in social inadequacy or momentary loss of temper'. In cases in the latter category an individualized measure may be approved, provided that the degree of violence used against the child is not grave and arrangements can be made for sufficient support and supervision to make recurrence of the offence unlikely.

[7] In short, the appropriate sentence depends on the facts of each case. The principles governing the court on appeal against sentence have been well established: See *PP v. Loo Choon Fatt* [1976] 2 MLJ 256, *Ng Tuck Shen v. PP* [1982] 1 MLJ 27, *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 201, *Lim Guan Eng v. PP & Other Appeals* [1998] 3 CLJ 769, *Mohamed Senik v. PP* [2005] 1 LNS 74, *Zaidon Sharif v. PP* [1996] 4 CLJ 441.

[8] Gordon Smith J in *R v. Teo Cheng Lian* [1969] MLJ 170 at p. 171 said:

> There must be a manifest error either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances before the higher court interferes with the discretion undoubtedly vested in the lower court.

[9] In *PP v. Loo Choon Fatt,* Hashim Yeop A. Sani J said:

> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly establised practice that the court will not alter a sentence merely because it might have passed a different sentence.

[10] The Supreme Court in *PP v. Mohamed Nor & Ors* echoed the same principles:

> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[11] The relevant factors to be considered in assessing sentence had been restated in *Mohamed Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 as follows:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

[12] *Halsbury's Laws of England,* Vol. 9, para 365 sums up the relevant factors as follows:

> The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the provocation which he had received, if the crime is one of violence, the antecedants of the prisoner up to the time of the sentence, his age and character.

[13] A plea of guilty is generally rewarded with a discount of between 1/4 - 1/3 of what otherwise would have been the sentence. The said discount is not based on the maximum sentence provided by law: See *Mohamed Abdullah Ang Swee Kang v. PP, supra, PP v. Ravindran & Ors* [1993] 1 MLJ 45.

[14] The court nevertheless retains the discretion to impose a higher sentence without giving a discount in appropriate cases. See for example *R v. Costen* [1980] 11 Cri. App. (S) CA 182 where the court said

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount.

[15] The pertinent question in this appeal is whether the learned magistrate had considered the above factors in sentencing the appellant. The appellant was unrepresented when he pleaded guilty and sentenced. An obvious omission is that the learned magistrate did not in her judgment take into account that the appellant had pleaded guilty and was a first offender.

[16] Nothing is known about the appellant's background. Being a first offender, the court, shall have regard, among others, to his character, antecedents, age, health and mental condition before passing sentence: See s. 294 Criminal Procedure Code. It is, in my view, desirable for the court to enquire from the offender himself where he is unrepresented before passing sentence.

[17] Before me, the appellant had, through his counsel, regretted his action and while on bail pending appeal, he had not done any harm to the daughter, who remained, and still is, under his care and custody. The victim's parents were divorced in 1995 when she was about one year old. The appellant remarried in 1996. The

A victim's natural mother had not seen her since the divorce and it appeared to me, that she herself would not be able to know or recognise her own mother. This information was not before the court of first instance.

B **[18]** A long custodial sentence under the circumstances, would in my view deprive her of parental care, love and financial support. It may have an adverse emotional and psychological effect on her. One wonders whether a non-working and dependent step mother, would affectionately look after the child whilst her husband is C serving a long custodial sentence. She may even decide to quit the matrimonial home. The appellant had two other children to support, namely a 19-year old son studying in UiTM and a 17-year old son in form five. The effect of a long custodial sentence, would leave the dependent children without parental care, love D and financial support.

[19] Let me make it clear here in order to dispel any perception that the court is lenient on sentence. The court views any offence of violence against children under the Child Act as grave and serious. Any offender, if found guilty under the Act will be met E with a stiff sentence where circumstances of the case warrant it. The Act, however is not solely meant to punish the offender. The Act is specially enacted to consolidate the laws relating to the 'care, protection and rehabilitation of children.' We have to look at the objectives of the Act as a whole. One of the ideals of the F Act as expressed in the preamble is to assist the family to "assume their responsibilities as the source of care, support, rehabilitation and development of children in society." A long prison sentence in this case may well destroy the family bond between the father and the daughter. The family may eventually disintegrate, an G eventuality which the Act seeks to prevent.

[20] For the above said reasons, I am of the considered view that a sentence of one year imprisonment would be adequate. The sentence of imprisonment is therefore reduced from two years to H one year imprisonment. The order of the learned magistrate under s. 31(2) of the Act is affirmed. A shorter term of imprisonment coupled with the order that the appellant entered into a bond of good behaviour for a period of three years with one surety would be more appropriate as this would enable him to assume his I parental responsibility immediately upon his release and try to save

the family from disintegration. If he does not repent and starts to abuse the child again after his release he will be greeted with a longer term of imprisonment.

[21] I had observed that the daughter was seated between the appellant and her step mother in the public gallery while the court was hearing other cases. I had enquired from the parties whether it would be advisable for the victim to leave the courtroom before pronouncing my decision. With agreement of the appellant's counsel, the daughter, accompanied by the stepmother, voluntarily left the courtroom before I announced my decision. It was also out of concern of her future and welfare, that I enquired from my interpreter what transpired after I stepped down from the bench at the end of the appeal. I was told that the daughter embraced the father, kissed his hands and wept before he was taken away to custody.